Filed 9/30/03 P. v. Hall CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD HALL, Defendant and Appellant.	A094198 (Humboldt County Super. Ct. No. CR994164AS)

Defendant Richard Brandon Hall was sentenced to life without parole after a jury found him guilty of the first degree murder of David Schauer with special circumstances in that the murder was perpetrated in the course of a robbery. The defense theory was that Mr. Schauer was murdered by defendant's companion, Ericka Ryan, who testified for the prosecution, and that defendant merely helped her to conceal the body. On appeal defendant contends that the trial court erred in various respects including the admission and exclusion of various items of evidence and the refusal to instruct the jury on the meaning of "accessory after the fact." We find no reversible error, and affirm the judgment.

BACKGROUND

Defendant is an army veteran who stands six feet two inches tall and who weighed, in 1999, over 200 pounds. Ryan is a sometime housekeeper who stood five feet tall and weighed 130 pounds at the time of trial. They met in early 1999 in Louisville, Kentucky, where they both lived. Ryan had been "partying" at her house with men who

brought crack and alcohol, while her husband was incarcerated on a work furlough program. She and defendant began staying at the home of Mickey Parsons, a friend of defendant's, after Ryan's in-laws took her children and locked her out of her home. Parsons testified that he and defendant talked about moving to Florida. Parsons testified that defendant's interest grew out of the fact that he "was goin' to court over a child support." According to Parsons, the two men talked, while drunk, about how they could finance the trip by mugging someone at a rest area. Defendant suggested that Parsons could lure someone back toward the restroom area, where defendant could "choke 'em out." This was a reference to defendant's ability, which both Parsons and Ryan witnessed and which defendant acknowledged on the stand, to render a person unconscious by applying a hold which closed off the carotid arteries in the neck.

Parsons changed his mind about going to Florida, but testified that defendant remained "intent" on going. Ryan testified that defendant "still wanted to go because he had warrants out for his arrest" which he said were "for child support." Parsons testified that when defendant first learned that Parsons was not going to Florida, he became loud and starting insulting Parsons's then-girlfriend. Defendant testified that the Florida plan was "no big deal," and that Parsons's change of heart was "fine," in part because Ryan was now "pushing" him to accompany her to San Francisco, where she said her brother could get them work. Parsons testified that he and defendant finally had a falling out in which defendant punched Parsons in the nose, choked him, and pinned him on the couch. Defendant denied any "physical fight" but acknowledged that Parsons "freaked out" and started calling him names. He said that this caused him to decide "on the spur of the moment" to go with Ryan to California, telling her "if you want to go, now's the time."

Ryan and defendant left Kentucky in his Mazda RX-7 with $1,400-1,500 between them. The trip took six days because of car trouble. They ran out of money in Gallup, New Mexico. They financed the rest of the trip by getting money from Ryan's family and by pawning defendant's golf clubs. Defendant testified that Ryan also "worked the truckers" for money and drugs at several points along the way.

On arriving in San Francisco they moved in with Ryan's brother Lucian.

Defendant lost his car when he lacked the wherewithal to retrieve it after it broke down and was towed. Ryan found work soliciting contributions for an environmental organization door to door, and then doing yard and house work for a Marin County woman she met while soliciting contributions.[1] Defendant was not working because, he said, "I couldn't find work anywhere that I would work."

On July 22 defendant and Ryan both enlisted with a company selling all-purpose cleaner door to door. While employed by the cleaning company they traveled from town to town by van with a group of younger recruits. They started in Santa Rosa and traveled north. When they reached Portland, Ryan decided she had had enough, and they quit. Company policy entitled them to a bus ticket to San Francisco, the point of hiring, but instead they got tickets to Klamath. Ryan testified that this was defendant's idea because he wanted to see the redwoods and they owed Lucian money. Defendant testified that they headed for the redwoods, instead of San Francisco, because he didn't want to see Lucian after Lucian found out about Ryan's abuses of his hospitality.

The bus left Portland on the evening of August 10 and drove all night. Ryan testified that when the bus reached Klamath the next morning, she refused to get off, and the driver let them ride to the next stop, Orick, where they got off. Having little or no money, they spent the next two days walking around the area, eating nothing and sleeping outdoors. Early on the morning of the third day, August 13th, they received a citation for an illegal fire, and according to defendant, one of the rangers pulled a gun on him due to an outstanding Kentucky warrant for "failure to appear."

---

[1] According to Ryan's recorded statement to police, which was played for the jury, defendant had a plan to rob the Marin woman. Defendant testified that he and Lucian had, on a single occasion, "teased" Ryan about robbing the woman, but that it was Ryan herself who produced a roll of duct tape and proposed taping the woman to a chair in order to use her card to get cash from an automated teller machine. Defendant acknowledged that it was he who cut the tape into shorter lengths and "re-roll[ed]" them into smaller, more portable rolls. He testified in essence that this was a habit he acquired in the army. The smaller rolls were found among his and Ryan's effects at the time of their arrest.

According to defendant, Ryan kept talking about stealing a purse or backpack. By the morning of August 13, she was nagging him to "do something" about their predicament. She asked if he was going to let them die in the forest. She said, "[W]hy don't you do the chokie on somebody or somethin'?" Defendant "slapp[ed] his legs real hard" and "stomp[ed] off."

After trying unsuccessfully to hitch a ride, they wandered into the Lost Man Creek parking area. There they encountered David Schauer, a divorced 42-year old postal worker from Cleveland, Ohio, who had rented a black Isuzu Trooper in Seattle on August 9 for a driving tour of the coast to Los Angeles. Schauer was of slight build, weighing around 150 pounds, and was a little under six feet tall. Both Ryan and defendant testified that Schauer approached them in the parking area and engaged them in conversation. From that point on, their versions of events diverge sharply.

Ryan testified that Schauer walked up to them and asked which of the nearby trails was the prettiest. She did not recall whether she spoke to him, but she remembered that defendant did. Schauer went up one of the trails, and after "a little bit," Ryan and defendant followed him. After a while they encountered Schauer coming back toward the parking area carrying a video camera. Ryan and defendant had communicated "through [their] eyes" about Schauer, leading her to understand that "this was the man that was gonna get the chokie." Ryan lay down and started playing with a banana slug, and Schauer stopped to look at it as well. Schauer had a brief conversation with defendant and then turned to proceed down the trail. Defendant charged him from behind, threw his left arm around his throat, and they both went down. Ryan heard a "gurgle" or something, and saw defendant's "muscles like real tight" as his arm was around Schauer's throat. Thinking that defendant was applying the "chokie," Ryan began to walk down the trail toward the parking area. However she "heard something strange" and turned around to see "David Schauer's head was looking at me" while defendant "was stomping on his head." She saw defendant stomp Schauer's head three times before she turned again and, panic-stricken, "started walking faster." She heard the rustling of sticks and leaves as she left. Defendant caught up with her, carrying the video camera

and a jacket, which he threw into the woods after removing the tape from the camera. When they got to the parking area he produced the key to the Isuzu and also showed her Schauer's driver's license, a bag of marijuana, and $60 in cash. In the Isuzu they found camping gear, credit cards, a musical keyboard, and bottles of Prozac, Valium, and Vicodin. They retrieved their bags from where they had cached them, and drove out of the area.

Defendant testified that that while he and Ryan were sitting in the parking area they were approached by Schauer, who seemed "stoned." Schauer invited them to meet him "up the trail" to smoke marijuana. Ryan accepted but defendant declined, saying he did not indulge in marijuana. Schauer got his video camera from the Isuzu and headed up the trail while Ryan pulled on her shoes and socks, asking defendant to go with her because she wanted to "smoke weed with this gentleman." Defendant agreed, and they walked up the trail after Schauer. Ryan was carrying a backpack and a seven-foot long walking stick. She also had two makeshift weapons: an 18 inch guardrail bolt, wrapped in tape, which they had found along the road, as well as a piece of cloth through a nut. As they walked she said she intended to get a ride or money from Schauer for a " 'blow job or sex,' whatever it took." Defendant stopped walking, saying, "I'm not going up there then." He turned around and walked back to a bridge they had crossed, where he waited for Ryan. Some 45 to 60 minutes later, she came running back down the trail, panic-stricken, and said there had been "an accident. They'd gotten in an argument, and the man might be hurt." Defendant ran up the trail with her until he saw Schauer lying "down the hill" from the trail. Defendant "panicked," jumped down the hill, and checked Schauer's pulse; there was none. He saw that Schauer had "a rock on his head." Defendant told Ryan to pick up the contents of her backpack, which had spilled on the trail, while he covered the body with logs. She pulled the tape from the video camera, which defendant grabbed along with Schauer's sweatshirt, and they "took off down the trail." Ryan let them into the Isuzu and drove it away. They switched drivers at a convenience store in Orick, and later stopped at a location along the highway where he threw the 18 inch guardrail bolt into the ocean because he thought she had "used it on the

man." Ryan had Schauer's keys, cash, credit card, and driver's license, along with marijuana and a pipe; she later found pills inside the Isuzu. Some time later—not that day—defendant asked Ryan what had happened and "[s]he said things got out of control and she had hit the man with rocks."

On the afternoon of August 15, two hikers found Schauer's body next to Larry Damm Creek Road, which leads from the Lost Man Creek day use area. It was covered with leaves, rotting vegetation, and two logs weighing about 150 pounds each. There were bloody rocks near his face and three more logs next to the body. His pants had grass stains on the knees and seat as well as some blood. Two of the pockets were turned inside out. The jeans were pulled up around the waist and skewed to the side as if someone had lifted him by the belt to carry or drag him. Some blood was present in the roadway above the body.

The prosecution pathologist, who conducted an autopsy, testified that it would be "fair to characterize the cause of death as blunt force trauma to the head."[2] In the head and facial area he observed redness suggesting an interruption of return blood flow to the heart. In the neck he observed bruises, linear scratches, coloration, internal bleeding, and a broken hyoid bone. These observations were consistent with choking, and some of them could have been caused by "somebody looping their left arm around his throat, twisting it towards his right shoulder blade and perhaps grasping it towards his right shoulder blade and perhaps grasping it . . . with their right hand and applying force." He attributed other marks on the neck to fingernails, "possibly those of the victim trying to release a . . . marked constriction." He acknowledged that the fingernail marks could have been left by an assailant, but considered this unlikely because there was no bruising under these marks indicative of choking. He also conceded that although a broken hyoid

---

[2] He also referred to the case as one of "death due to asphyxiation," but this was apparently inadvertent. The most reasonable interpretation of his testimony is that, although Mr. Schauer had been choked, asphyxiation was not the cause of death. In particular, the eyelids did not exhibit the broken capillaries commonly observed in death by asphyxiation.

bone is typically associated with strangulation, the bone could be "broken by . . . hitting or kicking . . . ." He agreed that this was the most likely cause of other bruising on the neck. He also observed injuries to the jawbone, left eyebrow and eye socket, scalp and face, buttocks, legs, and pelvic rim. One of the jaw fractures was consistent with having been struck with considerable force by a cylindrical object perhaps one-half to one inch in diameter, such as a machined wooden stick or small caliber pipe. Urine testing revealed the presence of opiates and cannabinoids. The opiates were consistent with medication, including hydrocodone, a prescription pain medication, and "did not of themselves present evidence that this person had abused drugs" other than marijuana. No defensive injuries were observed.

After Schauer's death, Ryan and defendant took the rented Isuzu and toured several western states, using Schauer's credit cards for everything from food and lodging to gambling and jewelry. In Wyoming they purchased a shotgun, which defendant sawed off and wrapped with duct tape. According to Ryan, defendant "had that gun on his leg everywhere we went." According to defendant, the gun was purchased on the pretext of protecting Ryan from bears and snakes, but he actually meant to kill himself with it.[3] Ryan testified that while they were driving around, defendant removed the Isuzu's license plates and replaced them with a temporary tag he stole from a car sitting on the roadside.

Eventually the credit cards were declined. The Isuzu ran out of gas on the freeway near Ashfork, Arizona. They hitched a ride into town with a trucker and traded defendant's watch for a night at a motel. Arizona trooper Todd Parenteau ran a check on the abandoned Isuzu and learned that it belonged to a California homicide victim. He found the trucker, who directed officers to the motel, where Ryan and defendant were

---

[3] Defendant also testified that after they again fell on hard times, Ryan exhorted him to "get out with the shotgun and now go make some money." In response, he testified, he went and had a smoke in the woods, then returned and told Ryan, "[t]here's no way it's gonna happen—you know. Gave some excuse." He also testified that he kept the gun under the mattress out of concern that Ryan might "want[] to grab it out of there during the night."

arrested on August 29, 1999. Officer Parenteau testified that while officers searched the room, he left defendant in the back of a patrol car for 90 minutes with the heater on. Officer Parenteau also testified that defendant attempted to hang himself in a holding area at the jail. Defendant minimized the seriousness of this attempt, stating that it was "still just a thought in my mind" when officers intervened. He testified that after this occurrence the Arizona authorities took his clothes and left him in a cell in only his underwear, with no blanket. On the next day he was interviewed by Humboldt County District Attorney's Investigator Michael Losey and Humboldt County Sheriff's Detective Michael Stone. (See pt. I., below.)

Ryan and defendant were both charged with murder (Pen. Code, § 187) with a robbery-murder special circumstance (Pen. Code, § 190.2, subd. (a)(17)). On August 15, 2000, Ryan pleaded guilty to voluntary manslaughter, with all sentencing options left open, and subject to the condition that she testify truthfully against defendant and waive her appeal rights. After the close of evidence in the trial of defendant, the jury was instructed on numerous alternative theories of first degree murder (murder with premeditation and deliberation, murder while lying in wait, murder in course of robbery, murder in course of conspiracy to rob, murder in course of attempt to rob, murder in course of aiding and abetting robbery or attempt to rob) as well as the lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter. After deliberating for slightly over four days, the jury found defendant guilty of first degree murder and found true the charged special circumstance. The trial court sentenced defendant to life without the possibility of parole. Defendant filed a timely notice of appeal.

I.
CUSTODIAL STATEMENTS

A. Background

On August 30, 1999, defendant was interrogated at the Yavapai County Jail in Prescott, Arizona, by Investigator Losey and Detective Stone. Prior to trial defendant

moved to suppress evidence of his statements to the officers. In his moving papers he asserted that he had not effectively waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)), and that any statements he made were involuntary.

On November 13, 2000, the court conducted a hearing on the motion to suppress. Investigator Losey testified that at the commencement of the August 30 interview he advised defendant of his *Miranda* rights, which defendant indicated he understood. The transcript discloses that defendant neither agreed nor refused to speak to the officers. The detectives spoke to defendant for about 30 minutes, and then after a 10-minute break they spoke with him for another 5 or 10 minutes. The second interview ended when defendant asked for an attorney. At no time did defendant say he killed Schauer in Humboldt County.

The court granted the motion to suppress on the ground that defendant had not knowingly, intelligently, and intentionally waived his *Miranda* rights. The court went on to state, however, that defendant's recorded statement "or portions of it may, of course, come in in the event that Mr. Hall should testify." The court did not make an explicit finding as to the voluntariness of defendant's statements, and the defense sought no clarification, then or later, on that issue.[4]

When defendant did testify, he volunteered his own version of the interrogation by Investigator Losey and Detective Stone. He stated that when they "first began to talk to [him]," he "did talk to [them]," and "told them quite a number of things that weren't correct," including that he had "just found" Mr. Schauer's Isuzu on the freeway, out of gas, with the keys in it. He acknowledged that he had denied getting into "any trouble in Humboldt County," as well as that he told the officers he had entertained thoughts of

---

[4] The court clearly recognized that defendant's motion to suppress raised a distinct issue of voluntariness. During the evidentiary hearing of November 13, the court observed, "[T]his motion, the way I read it, goes beyond the Miranda rights. It goes to voluntariness." Later the prosecutor argued that "you need some sort of . . . state action to render a confession involuntary," providing citations, which the court asked him to repeat.

suicide due to "personal issues from things in my past." The officers "kept trying to steer [him] into talking about what happened with David Schauer" but he "wouldn't talk about it." He explained, "I didn't feel right. I was exhausted. I had been up. I'd been sweat. I'd been froze in the cell with no clothes. I just wasn't in the right frame of mind to be talking." He also testified that "[t]here was a lot of confusion" during the interview, that the investigating officer "wouldn't say things straightforward. He said stuff like, have you ever been to Humboldt County? I don't know what Humboldt County is. I'm going, I don't know. I said—you know—I'm trying to think of the places I've been in California. I said, I've been to Red Bluff—you know—Weed. I—there was just confusion."

Asked by his counsel why he "didn't come right out and talk to Detective Losey and Stone and tell them what had happened with Mr. Schauer," defendant replied, "[t]he reason that I didn't say anything was because Ericka Ryan had swore throughout those sixteen days that she was going to tell them what happened. I believed her. I had her swear to God. She told me she would." After confirming that defendant expected Ms. Ryan to "tell the truth if she talked to the police," counsel asked if "at some point during your conversation with the detectives, you decided you weren't going to talk to them anymore; and you told them, whatever Ericka says happened is what happened. Why did you tell them that?" Defendant replied, "I had seen her come out of the room crying. Then they wanted to talk to me. When I went in there, I told 'em, whatever she says happened, that's what happened. I'm—you know—done talking."

After completion of defendant's direct examination, the prosecutor sought leave "to play the tape" of the August 30 interrogation "while Mr. Hall is on the stand." He noted that defendant had "talked about that statement in direct examination, and . . . talked about the tactics of the investigating officers, their vagueness, the manner in which they asked him questions," making "the whole thing . . . relevant." The court referred to its earlier ruling that "it couldn't come in in your direct," but that "if he testifie[d], it might very well come in in cross-examination." Defense counsel said, "I think we certainly opened the door on—on our direct, and that was intentional. And we certainly

planned to do that. That was the way we went. As far as playing the entire tape, I'm not so certain that's going to be relevant at this point . . . ."

Later, during a break in defendant's cross-examination, the court alluded to "a brief discussion off the record" and expressed the understanding, to which defense counsel expressly acceded, that "you agree that Mr. Hall through the questions has opened the door to at least some of the tape." The court asked counsel whether there were "any particular aspects of the tape or portions which you object or you think are prejudicial, anything of that sort," to which counsel replied, "I do not, Your Honor." The court said, "Okay. With that, then, I will allow the entire tape to be played . . . ." Ultimately the recording and a transcript were received into evidence "by stipulation," and the recording was played for the jury.

On redirect examination defendant acknowledged that he was evasive and untruthful in response to the officers' questions about Lost Man Creek but attributed this to confusion and lack of sleep. He testified that although he knew Ryan had killed Mr. Schauer, he "just couldn't bring [him]self" to say so to the officers, "knowing that she had swore to me that she would tell. She swore to God. I mean, to me that's a big deal, especially just like up here, swearing before God that you'll tell the truth. I believed her." Asked why he "didn't . . . simply tell them you helped cover up Mr. Schauer's body," he replied, "Again, I—I don't know why."

B. Principles

Defendant sought to suppress his statements to Investigator Losey and Detective Stone on two distinct grounds: (1) that they were taken without a knowing and voluntary waiver of his rights as required by *Miranda*; and (2) that the statements were involuntary. The court adopted the first argument, but impliedly rejected the second. The distinction is critical, because statements taken in violation of *Miranda* are excluded only from the prosecution's case in chief; they may be introduced for impeachment insofar as they conflict with a defendant's trial testimony. (*Harris v. New York* (1971) 401 U.S. 222, 225-226; *People v. Peevy* (1998) 17 Cal.4th 1184, 1193-1194.) In contrast, a defendant's

involuntary statement cannot be admitted for any purpose, regardless of compliance with *Miranda*; "*any* criminal trial use against a defendant of his involuntary statement is a denial of due process of law." (*Mincey v. Arizona* (1978) 437 U.S. 385, 398, italics in original; *New Jersey v. Portash* (1979) 440 U.S. 450, 459; see *People v. Peevy*, *supra*, 17 Cal.4th at p. 1193; *People v. Neal* (2003) 31 Cal.4th 63, 85 [statements were involuntary, and inadmissible even for impeachment, where officers deliberately continued interrogation after defendant requested counsel].)

The voluntariness of a defendant's statements depends essentially on whether the statements were freely made or were the product of police coercion. "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. [Citation.] The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." (*Culombe v. Connecticut* (1961) 367 U.S. 568, 602; see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225-226.) To render a statement involuntary for constitutional purposes, the "compulsion" in question must originate with the state: "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.)

In determining whether statements were voluntary, courts consider the "totality of circumstances." (*Withrow v. Williams* (1993) 507 U.S. 680, 689; *People v. Massie* (1998) 19 Cal.4th 550, 576.) Relevant circumstances include "both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226; *People v. Benson* (1990) 52 Cal.3d 754, 779.) Among the former are the defendant's intelligence (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226), as well as his or her maturity, education, physical condition, and mental health (*Withrow v. Williams*, *supra*, 507 U.S. at p. 693). Among the relevant features of the questioning are the "crucial element of police coercion," the length of the interrogation, its location and

continuity, and the absence of warnings as to the right to counsel and to remain silent. (*Id.* at pp. 693-694.)

The prosecution has the burden of establishing the voluntariness of a challenged statement by a preponderance of the evidence. (*People v. Williams* (1997) 16 Cal.4th 635, 659; see *Lego v. Twomey* (1972) 404 U.S. 477, 489.) On appeal we review the trial court's factual findings "under the deferential substantial evidence standard." (*People v. Williams, supra,* at p. 660.) Of course, we "review independently the trial court's determination on the ultimate legal issue of voluntariness." (*Id.* at p. 659; cf. *People v. Weaver* (2001) 26 Cal.4th 876, 921.) If we conclude that the statements were admitted in error, the judgment must be reversed unless the error is harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

C. Discussion

At the threshold we note that evidence of defendant's statements was first introduced not by the prosecution but by the defense as part of its case in chief. In *People v. Williams* (2000) 79 Cal.App.4th 1157, 1167-1170, the court held that where a defendant testified about his un-*Mirandized* exculpatory statements to police, the prosecution could introduce evidence of those statements and the jury could be instructed that the statements could support an inference of consciousness of guilt if they were wilfully false when made. The court noted that the defense could have avoided any such adverse inference by refraining from introducing the statements. (*Id.* at p. 1168.) The record here leaves grave doubt whether defendant did not similarly "open the door" to the challenged evidence by giving his own version of the interrogation in some detail. Indeed defense counsel stated that he had "opened the door" on direct, adding, "and that was intentional . . . . [W]e . . . planned to do that." We doubt that a defendant can present his version of an extrajudicial statement, and then, by claiming the statement was involuntary, prevent the prosecution from introducing its version of the same statement. (See *People v. Matthews* (1980) 108 Cal.App.3d 793, 795 [defendant "introduced the

subject" of his postarrest silence to police during direct examination; "[t]he questioning and comments of the People, following Matthews' invitation to explore the subject, were proper"].)

A different result might follow where a defendant introduced a statement *defensively*, in anticipation of its introduction by the prosecution pursuant to a ruling already made by the trial court. Even if that were the case here, however, the trial court's implied finding of voluntariness is sustainable on the record as a whole. A number of factors identified or suggested in the cases cited above supported the finding, including defendant's maturity; his good, if not excellent, physical condition; the absence of any concrete medical or drug-related impairment to his faculties; the relative brevity of the questioning; and the fact that the statements were made after a proper *Miranda* warning which defendant indicated he understood. In addition we note Investigator Losey's testimony that defendant was dressed, appeared clean and neat, did not seem unusually tired, did not complain of hallucinations, and seemed rational. To Investigator Losey's recollection, defendant did not cry at any time during the interrogation.[5]

In contending that the statements were involuntary, defendant points to evidence that (1) he had attempted suicide the day before the interrogation; (2) as disclosed by the recording, he appears confused; (3) he told police he was sleep-deprived; (4) he requested medicine or medical attention; (5) he was manifestly trying to avoid talking to officers; (6) the officers persisted, telling defendant he "needed to talk" about the incident because the failure to do so was "eatin' " him up. He also alluded in the trial court to his mistreatment by Arizona authorities, first by "sweating" him in a patrol car and then by "freezing" him in a cell.

We do not believe these considerations mandated a finding of involuntariness in light of the record as a whole. The hesitant and faltering speech which defendant

---

[5] The transcript of the questioning describes defendant as "crying" at one point. We have listened to the recording, however, and hear nothing more than sniffling, sighing, and throat clearing.

attributes to "confusion" is no more pronounced or remarkable than that which might be expected of anyone undergoing questioning on a matter of importance. Indeed he does not misspeak any more often, or more noticeably, than many persons testifying at trial—including defendant himself. His attempted suicide and other circumstances may have been consistent with a depressed or anxious mental state, but there is no suggestion of a " 'breaking down or loss of composure.' " (*People v. Benson*, *supra*, 52 Cal.3d at p. 780; see *id.* at pp. 783-784 [finding of voluntariness sustained despite defendant's placement in " 'rubber room' " on suicide watch; trial court properly found that defendant's confession to jail psychiatrist was product not of coercion but of his " 'going through some terribly draining emotional feelings' " that he needed to " 'get . . . off his chest' "]; *People v. Castille* (2003) 108 Cal.App.4th 469, 486-488 [finding of voluntariness sustained although defendant "sobbed deeply as he described the shooting" and "continued to sob for the remainder of the interview"].)

Defendant's claimed need for medication or medical attention was not borne out by anything he told the officers and has never been substantiated since. When asked whether he wished to speak to the officers with his *Miranda* rights in mind, defendant sidestepped the question and said that he should "probably see my doctor, or at least take my medicine." But he was unable to tell the officers what his medicine was, and while he acknowledged having seen the jail nurse, he said he "couldn't talk to her" because "[s]he's ah, a psychiatrist or somethin[']like that." The audible portions of the transcript suggest that he had not taken the medication for "awhile," apparently since leaving Louisville. The trial court was entitled to conclude, as do we, that the evidence fails to suggest any medical condition interfering with defendant's freedom of choice. Nor was the evidence of sleep deprivation sufficient to warrant a finding of increased susceptibility to coercion. At the outset of the interview, which began at 1:25 p.m., defendant acknowledged that he had just woken up. Apart from his negative answer to the question whether he had slept well, and his trial testimony that he was "exhausted," there is little evidence of sleep deprivation. There is no evidence of exhaustion sufficient to contribute to a loss of the power of choice.

Nor does defendant identify any police conduct so coercive that it might be reasonably supposed to have overborne his will. He testified at trial that Arizona authorities "sweat[ed]" him in a squad car the day before the interrogation, and "froze" him in a cold cell without clothes or blanket on the intervening night; he also suggested that he feared what a small-town police department might do to him. But even if this evidence is properly considered in derogation of the court's ruling on voluntariness—which preceded the introduction of this evidence—there is no reason to believe that any of these events coerced defendant into speaking to the California officers. Nothing in the record suggests that he expected protection from them, let alone that they did anything to condition his sense of safety on his willingness to speak. The only suggestion of a causal relationship between defendant's speaking and any other event was the officers' urging him to tell what he knew because his knowledge was "eating him up." Such an appeal to a defendant's emotional well being cannot be considered coercive without evidence of some peculiar susceptibility. The absence of such susceptibility is shown here by the very fact that, despite the officers' entreaties, defendant did *not* share his knowledge with them but issued a series of falsehoods, evasions, and half-truths.

This brings us to defendant's contention that merely by continuing to question him without a legally valid waiver of his *Miranda* rights the officers deprived him of the "free and unconstrained choice" whether to speak or remain silent. Such an argument can have considerable weight where authorities deliberately persist in interrogating a suspect *after a clear invocation* of those rights. (*People v. Neal*, *supra*, 31 Cal.4th 63 at p. 84.) But this did not occur here. After being given his *Miranda* rights, defendant *did not answer* the question whether he wished to speak. Instead he spoke of his supposed need for medical attention while confessing that he had declined to speak to the jail nurse about it and that, apparently, he had been functioning without his unspecified medication for months, i.e., since leaving Louisville. This allusion to Louisville led naturally enough to the question, "So you been doin['] some traveling?" to which defendant replied that he had gone to San Francisco. The ensuing discussion of his travels eventually led to questions about his relationship with Ryan, the provenance of the Isuzu, and his presence

and activities in Humboldt County. But the crucial point for present purposes is that, in stark contrast to *Neal*, officers promptly discontinued the questioning when defendant finally did invoke his *Miranda* rights.

We think it is clear that the officers did not engage in coercive conduct sufficient to render defendant's statements involuntary merely by continuing to talk to him after he *failed to state* whether he was willing to talk to them. Nor can we accept his contention that this conclusion is inconsistent with the trial court's finding that during the interrogation defendant "was trying" to "avoid giving a statement," to "tell the officers no," and to "put them off." Defendant contends that this finding "virtually compelled an identical ruling on the voluntariness issue" by making it "crystal clear that [defendant] did *not* want to talk to the police in a ['] *free and unconstrained*' manner." However this argument equates the voluntariness or involuntariness of defendant's *statements* with the presence or absence of an implied waiver of his *rights* under *Miranda*. The fact that a suspect may prefer not to speak to officers does not mean that when he chooses to do so, without having effectively waived his *Miranda* rights, his choice is not the product of his own free will.

This case differs significantly from *Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, on which defendant heavily relies. The officers there persisted in interrogating the defendant after he clearly and unequivocally asserted his right to counsel; the case thus anticipates the holding in *Neal*, *supra*, 31 Cal.4th at p. 85. Moreover the interview transcript there "reveal[ed] a confused and frightened defendant who garbled his sentences, was frequently inaudible, and was often entirely incoherent for long passages." (197 F.3d at p. 1027, fn. 3.) Throughout the interrogation, the defendant was "shaken, confused, and frightened, crying in parts and frequently asking for forgiveness" (*id.* at p. 1027), and he was "sobbing by [the] end" (*id.* at p. 1027, fn. 3). The present record contains nothing comparable to this level of distress and loss of composure, or to the "slippery and illegal tactics" employed by the detectives in that case. (*Id.* at p. 1027.)

The trial court did not err by finding defendant's statements to be voluntary and hence admissible in rebuttal despite its finding of a *Miranda* violation.

II.
INVOCATION OF RIGHT TO COUNSEL

A. Background

Defendant next contends that the trial court erred by permitting the jury to hear that the interrogation of August 30 was terminated by defendant's invocation of the right to counsel. After defendant's direct examination, and pending the court's ruling on how much of the taped interview to admit into evidence, the prosecutor asked for a ruling that defendant's invocation of the right to counsel was now also admissible. The prosecutor stated that defendant's testimony had "[l]eft the impression that . . . he simply stopped talking to the officers because he was of the opinion that . . . Ericka Ryan would . . . confess to everything and that wouldn't be necessary. That wasn't the case. He asserted his Sixth Amendment right to speak with an attorney." The request for counsel, the prosecutor continued, "related to why it is that the conversation stopped . . . . [T]he impression I was left with [was that] [the interrogation stopped] because he didn't want to talk anymore. What really happened was he asked to talk to an attorney. And when he does that, the police have to stop. There's, I think, a big difference between the—the impression that he left and the reality of the situation." The prosecutor indicated that the invocation would have been shown by the testimony of Inspector Losey, "because the invocation comes later off tape." The court ruled, "[I]t would appear that such conversation would be relevant because of what he has testified to. So I would allow that."

Consistent with this ruling, the following exchange took place at the conclusion of the prosecutor's initial cross-examination of defendant:

"Q. After the officers talked to you the first time . . . did they ask you to give your word that you would be willing to talk to them again?

"A. Yes, sir.

"Q. And did you tell them that you would talk to them again?

"A. Again, sir, yes, I did. At the time, I would have done anything to just have

my clothes on and not to have been possibly assaulted.

"Q. And when they came back to talk to you again as you had promised them you would—

"A. Yes, sir.

"Q. —you told them that whatever Ericka said was what happened, didn't you?

"A. Yes, sir. Before they had talked to me, again, Ericka Ryan had left the interview room crying, and I had seen that. When they then asked me to talk to 'em, I went in and said, whatever Ericka Ryan says is what happened.

"Q. And you said that more than once, didn't you?

"A. I might have said it twice.

"Q. And then you told them that you wanted an attorney?

"A. Yes. I—I think I said I do not want to talk anymore."

Apparently because this testimony established defendant's invocation of counsel, no prosecution witness was called to testify on that subject. However in closing argument the prosecutor noted that "the conversation ended when [defendant] asked to speak with an attorney." Defendant also notes that in cross-examination, Ryan volunteered the statement that in her repeated interviews with police she "told God's honest truth *with no attorney* 'cause that's how sure I was of . . . my part in . . . this whole scene." (Italics added.)

B. Principles and Discussion

As we have previously noted, a defendant who testifies is subject to impeachment using voluntary statements taken in violation of *Miranda*. However, the defendant cannot be impeached with, nor can any other use be made of, his *silence* after he has received *Miranda* warnings. (*Doyle v. Ohio* (1976) 426 U.S. 610, 611.) "A similar process of reasoning supports the conclusion that comment which penalizes exercise of the right to counsel is also prohibited." (*People v. Crandell* (1988) 46 Cal.3d 833, 878, overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; see *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520; *Wainwright v. Greenfield* (1986)

474 U.S. 284, 298 [evidence of invocation of right to counsel, after *Miranda* warnings, was inadmissible to rebut defendant's claim of insanity].)

Respondent asserts that defendant has failed to preserve the *Doyle-Crandell* objection for appeal. Evidence Code section 353, subdivision (a), sets forth the familiar rule that error in the admission of evidence cannot support reversal of a judgment unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." In *Crandell* itself the Supreme Court noted that the absence of such an objection supported, or "might" support, its rejection of a *Doyle* objection. (*Crandell*, *supra*, 879 Cal.3d at p. 879, fn. 14.) In *People v. Carter* (2003) 30 Cal.4th 1166, 1207, the court held that objections to cross-examination about the defendant's invocation of counsel—including an objection based on *Doyle*—were not preserved for appeal because "counsel's solitary objection at the outset of the line of questioning failed to specify the grounds he now urges."

Defendant asserts that Penal Code section 1044[6] obligated the trial court to exclude evidence of his request for counsel even in the absence of objection. That statute, however, "does not abolish or supersede the rules of trial objection or appellate waiver." (*People v. Arias* (1996) 13 Cal.4th 92, 160.) Nor does it "impose a sua sponte duty on the court to exclude evidence." (*People v. Ochoa* (1998) 19 Cal.4th 353, 453.) Although it uses the term "duty," section 1044 is an affirmation of the trial court's *power* to control proceedings on its own motion. (See, e.g., *People v. Fusaro* (1971) 18 Cal.App.3d 877, 887 [noting trial court's "inherent statutory power to exercise reasonable control over the trial"], disapproved on another point in *People v. Brigham* (1979) 25 Cal.3d 283, 292, fn. 14; *People v. Cox* (1991) 53 Cal.3d 618, 700 ["A trial court has inherent as well as statutory discretion to control the proceedings to ensure the

---

6 "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Pen. Code, § 1044.)

efficacious administration of justice."].) The statute has no bearing on the present issue.

Defendant asserts that his claim of *Doyle-Crandell* error was embraced within his "over-arching objection to the admissibility of the statement as a whole." The only "over-arching objection" was the one embodied in his motion to suppress his statements in their entirety. That motion embodied no reference to the *Doyle-Crandell* rule; it was premised on the contentions that all of defendant's statements violated *Miranda* and were involuntary. Initially, the defense may well have been entitled to assume that the court's granting of that motion would also bar evidence of the request for counsel. However any ground for such reliance disappeared when the court ruled that defendant's statements could come into evidence in rebuttal, and particularly when it specifically asked counsel for his views about the admissibility of defendant's invocation of the right to counsel. Counsel's response at that time could at most be construed as an objection on grounds of relevance; certainly it did not tender a *Doyle-Crandell* objection.[7] At no time did defendant bring such an objection to the court's attention, and in its ruling admitting the evidence the court alluded only to its relevance.

Defendant contends that if counsel is understood to have waived the *Doyle-Crandell* objection, his doing so should be deemed ineffective assistance of counsel justifying relief in its own right. This passing assertion is unaccompanied by any discussion of the relevant considerations, including most notably whether there might have been a tactical reason for the failure to object. (See *People v. Eshelman, supra,* 225 Cal.App.3d 1513 at pp. 1521-1522 [counsel declared that he permitted questioning, objectionable under *Doyle*, in order to avoid speculation by jury that defendant had made a confession which was kept out of evidence].)

In any event we are satisfied that introduction of defendant's request for counsel was harmless beyond a reasonable doubt. The only prejudicial tendency of the evidence

---

[7] "If the Court is going to allow Mr. Hall's statement in, then I think what the prosecutor is alluding to is a matter more for argument. If those statements are made, he can certainly elicit those statements and use them for argument anyway he chooses. We submit it."

was to suggest consciousness of guilt. But the jury was virtually certain to draw such an inference anyway from numerous other matters in evidence. The first and most dramatic of these was defendant's attempted suicide the day before the interview. Defendant sought to minimize the seriousness of this attempt on the witness stand, but he affirmatively testified that he had thoughts of suicide both before and after his arrest. The jury was unlikely to find his explanation for these thoughts to be nearly as persuasive as the premise that he was guilty of killing Schauer.[8]

The jury was also likely to infer consciousness of guilt from the admittedly false statements defendant made to officers and the implausibility of his explanation for his failure to tell them that Ryan was the killer. Defendant claimed that he trusted Ms. Ryan to confess, as she had repeatedly promised to do in the event of apprehension. But defendant's mere belief that she would confess hardly furnished a plausible reason for him to tell police affirmatively, as he did, that Ryan "never done anything, but just be there for me," and "Erica's done nothin[']], but, stay by my side . . . ." Defendant's version of events conspicuously lacked an affirmative motive for him to mislead police—thereby exposing himself to possibly severe consequences—when he could have simply corroborated what he believed Ryan was already telling them, i.e., that she had killed the man they were asking about. No such motive appears on this record. Defendant suggested in cross-examination that he was "being evasive" with the officers because he "didn't want to tell on" Ryan, but he claimed no feelings which might explain this preference. On the contrary, he testified that he had "no strong emotional ties" to her. Nor would there be any apparent point in lying to protect her if in fact she was in the process of confessing. Defendant's explanation for the inconsistencies between his statements to the officers and his testimony at trial makes so little sense that the jurors

---

[8] Defendant testified that he had tried to kill himself, or at least considered it, "[b]ecause of family issues . . . concerning my son. My wife has time and again created problems . . . . [W]e don't have the best relationship. And that's weighed on me for—since '90." Why these feelings should have come to a head when he was in jail for a murder which Ryan supposedly committed was not satisfactorily explained.

were highly unlikely to credit it under any circumstances. And if the jury rejected defendant's explanation for his supposed lies to the officers, they were left with only one other explanation: he was lying at trial when he painted Ryan as the killer.

We are satisfied beyond a reasonable doubt that the jury would not have accepted defendant's version of events, but would instead have found defendant guilty beyond a reasonable doubt, whether or not it learned that defendant terminated the August 30 interrogation by invoking his right to counsel.

III.
CONFRONTATION OF ERICKA RYAN

A. Sustained Objections on Cross-Examination

Defendant contends that the trial court violated his rights to confront adverse witnesses and to employ the compulsory processes of the court in his defense, by improperly limiting his cross-examination of Ericka Ryan. Defendant first cites four specific rulings on objections, none of which is distinctly addressed anywhere else in the briefs. Indeed defendant fails to provide citations to the points in the record at which these alleged errors occurred. Our own review of the record does not support a conclusion that the court committed prejudicial error, or any error, in the matters complained of.

Defendant first suggests that the court should have permitted an answer to the question whether Ryan's husband had a "basis for his fears" about her marital fidelity Defense counsel first alluded to her earlier testimony that her husband had asked one Rodney Moore to "watch" her. She testified that her husband was "paranoid" with respect to the possibility that she was "having affairs while he was in jail." She acknowledged that she did in fact have an affair with Mickey Parsons. Counsel then asked, "[so]o your husband had a basis for his fears; is that correct?" The prosecutor objected on grounds of relevancy and Evidence Code section 352, the court sustained the objection, and defense counsel moved to another subject without further comment or argument. The court's ruling appears correct. The question was argumentative if not

rhetorical. Nor can we conceive of any prejudice from the court's ruling, since the jury was as competent as the witness to determine what constituted adequate grounds for a third person's fears.

Defendant also refers to the court's partially sustaining a relevance objection to a question about Ms. Ryan's drug use prior to 1999. After an unreported sidebar conference, the court "limit[ed] any inquiry into that subject to the time period we've discussed," i.e., of her involvement with defendant. Because the substance of the sidebar conference was never made a matter of record, it is impossible to know what offer of proof or other matter may have been presented. We therefore cannot say either that the ruling was erroneous or that it had any effect on the verdict.

Defendant also complains that the court should not have sustained hearsay objections to questions about statements Ms. Ryan may have made to police investigators. Defendant offers no argument as to why these questions, which sought testimony about out-of-court statements, should have been allowed over a hearsay objection. It is of course conceivable that some or all the statements in question might have been admissible as prior inconsistent statements, had a proper foundation been laid. We are directed to no such foundation, however. Nor does any prejudice appear.

B. Medical Records

1. Records Produced and Inspected in Camera.

Defendant's major claim of denial of the rights of confrontation and compulsory process concerns the trial court's orders quashing subpoenas which sought access to psychiatric records. Defendant contends that the trial court should have examined the records in chambers and should have disclosed to the defense any information bearing on Ryan's credibility, specifically including the conditions for which she was receiving psychotropic medication, to which she testified at trial, as well as "any references to Schauer's murder or to appellant that might have been contained in Ryan's psychiatric records."

Defendant's argument is difficult to parse in context of the record, in part because

he makes little attempt to distinguish among the several defense subpoenas which sought medical or psychiatric records. Three of them resulted in the production of records, at least two of which were reviewed by the trial court. The court first considered a packet of records from Baptist East Hospital in Louisville, Kentucky. Counsel for Ryan objected to disclosure of these materials on grounds of relevance and physician-patient privilege. The court stated that it had "reviewed those records in detail," and asked defense counsel whether there were "particular types of matters about which you're interested in obtaining the records?" Counsel replied, "Yes, Your Honor. Specifically, instances of—that might weigh for or against Miss Ryan's credibility, instances of prior conduct in terms of prostitution. Those two specific areas is what I'm looking for." The court stated, "Having reviewed the records, I don't believe there's anything that even remotely would be close" to the matters identified by counsel The court then turned to a "packet of materials . . . from Seven Counties Services, Inc.," with substantially identical results, i.e., the court declared that "[h]aving reviewed those records in detail, I find that there is nothing that would be material. There's nothing that would relate to credibility or prostitution."

The court then considered a packet of records from the Humboldt County Correctional Facility, which apparently originated from California Forensic Medical Group, which provided medical services for the jail. The court postponed a further ruling on these records, and then postponed it again to permit defendant to file a response to Ryan's motion to quash. We find in the record no further proceedings concerning these materials.

Defendant offers no basis for reversal of the court's ruling with respect to records it actually inspected except to ask this court to conduct its own review of the records to determine whether they contained any information of potential use to the defense. We have done so and detect no error in the trial court's rulings.

2. Records of Defense Consultant Berg.

The court also considered a defense subpoena, which Ryan apparently sought to

quash, for the records of Dr. Berg, who was apparently engaged as a consultant by the Ryan defense team. At the second of two hearings on the motion, the court announced that it was granting the motion to quash. It explained, "I find that the records . . . come within the attorney-client privilege as well as perhaps within other privileges. It appears that Dr. Berg is a consultant hired by . . . Ms. Ryan's defense. And I think that those records would fall within the same privilege [as] if someone was trying to get the records of [Ms. Ryan's attorney] or his investigator and the like." The court added that there had been no "showing of . . . materiality" in that Ryan had "given numerous statements" and there was no showing or offer of proof that any of these statements "would be contradicted by anything else." The court continued, "There's no showing at all that Ms. Ryan would have any kind of a lack of credibility or mental problems that would mean that we should look further in that regard. There are no allegations that she's had thought difficulties, delusions, hallucinations, or any mental illness that would affect her ability to perceive, recollect, or relate incidents to which she was a witness." The court added that Ryan was "not a stranger" to defendant and that the two had apparently been "together for at least some significant period of time prior to the incident in question." Thus there was "no showing as to why these materials would be needed," and no "basis to go beyond or behind the attorney-client privilege." The court also observed that the conditional nature of Ryan's plea provided "a reason to maintain that attorney-client privilege."

Appellate counsel is apparently speaking of the Berg records when he faults the trial court for "fail[ing] to review Ryan's psychiatric records." He then attacks portions of the court's ruling on those records, such as a supposed finding that Ryan had not made inconsistent statements prior to trial. However he never addresses the primary ground on which the court acted, which is that Berg was engaged as a consultant by the Ryan defense team, and his records were therefore shielded by the attorney-client privilege. Given the uncontested premise that Berg was hired as a defense consultant, the trial court was entirely correct in concluding that defendant's communications to him were shielded by *both* the psychotherapist-patient privilege *and the attorney-client privilege*. (*People v.*

Gurule (2002) 28 Cal.4th 557, 594; see *People v. Clark* (1993) 5 Cal.4th 950, 1005.) While the former privilege may give way to a criminal defendant's demonstrated compelling need for disclosure, the same cannot be said of the latter. In *People v. Gurule*, *supra*, 28 Cal.4th at p. 594, the court rejected a claim of error materially identical to defendant's claim here. The trial court had inspected certain psychiatrists' records insofar as they were not part of a psychiatric consultation with the witness's defense team, but had refused to inspect records prepared in connection with psychiatrists' engagement by the defense as experts. The Supreme Court held that this approach was entirely correct; "a criminal defendant's right to due process does not entitle him to invade the attorney-client privilege of another." (*Ibid.*)

Moreover, even if the attorney-client privilege in this context was not absolute, it could only be overcome on a compelling showing of need. (See *People v. Godlewski* (1993) 17 Cal.App.4th 940, 945-946 [rejecting contention that privilege should have been overridden when asserted by co-defendant].) At trial defendant offered no reason for disclosure of any of the psychiatric records other than that they might contain unspecified information bearing on Ryan's credibility as a witness or might contain some evidence of her engaging in prostitution. Without deciding whether this might afford sufficient cause to overcome the psychiatrist-patient privilege, we are confident that it was not enough to overcome the attorney-client privilege.

Nor is defendant's argument greatly advanced by his references on appeal to Ryan's testimony that she was taking several psychotropic medications because she had been a "basket case," and that she had "always been . . . depressed." Defendant implies that the undisclosed records could have helped to establish that Ryan's ability to accurately perceive, recollect, and report was adversely affected either by the underlying condition or by the medications. But this ground for disclosure was never advanced in the trial court. Nor was the cited testimony before the court when it granted the motion to quash. (See *People v. Hardy* (1992) 2 Cal.4th 86, 167 [order denying severance is reviewed "on the facts as they appeared at the time the court ruled on the motion"].) In the absence of authority to the contrary, we believe the burden was on the defense to seek

reconsideration of the court's order if it believed that Ryan's trial testimony established grounds for a modification.

Nor does anything before us provide a basis to doubt that defendant could have fully explored Ryan's psychiatric condition as well as the effects of her medication by a combination of cross-examination and consultation with psychiatric experts of his own. Without some reason to believe that such measures would have been unavailing, we cannot suppose that Ryan's trial testimony, by itself or in conjunction with other defense arguments, afforded the kind of compelling justification which would be necessary to breach the attorney-client privilege—if indeed *any* showing can justify such a breach.[9]

Nothing in this record establishes an unconstitutional or otherwise erroneous abridgement of defendant's rights to cross-examine witnesses and to utilize the compulsory processes of the court in his defense.

IV.
OTHER CRIMES

Defendant contends that the trial court erred prejudicially by permitting the prosecution to adduce evidence (1) that defendant left Kentucky because he had outstanding arrest warrants for failure to pay child support; and (2) that according to Ryan's taped statement to police, defendant suggested kidnapping or robbing the Marin County woman by whom Ryan was briefly employed after Ryan and defendant arrived in San Francisco.

The trial court originally *granted* various defense motions to exclude evidence of prior misconduct by defendant, including evidence of "the Kentucky warrant" for nonpayment of child support and the rest of his "family law file." However, the defense

---

9 We gather from remarks below that both Ryan's motion to quash and defendant's opposition were filed under Ryan's docket number rather than this one. Presumably as a result of this, neither appears in the present record. Of course, procedures were available to correct or augment the record if misfiled materials were material here. Rather than reject defendant's argument on the basis of an inadequate record, however, we have addressed it on the merits to the extent that the incomplete record permits.

did not object when Ryan alluded to the outstanding child support warrants as a motive given by defendant for wanting to leave Kentucky. Nor was there any objection when prosecution witness Mickey Parsons referred to defendant's "goin' to court over a child support" as the reason defendant wanted to go to Florida. If this testimony was thought to violate the order in limine, the remedy was to move to strike the testimony and admonish the jury. The failure to object or otherwise request relief precludes review.

Respondent also contends that the trial court correctly determined, later in the trial, that defendant opened the door to evidence of his outstanding child support warrant when he implied in his own testimony that he agreed to accompany Ryan to California on the "spur of the moment" only because she had been urging him to go and he had a falling out with Parsons. Respondent also notes defendant's testimony that when he was cited by a park ranger for starting an illegal fire on the night before the killing, the ranger mentioned a "warrant for failure to appear in Kentucky." Based on this testimony the prosecutor moved for permission to introduce evidence of the warrant. The trial court granted the motion, stating that defendant "isn't allowed to get on the stand and pick and choose what things he wants to testify about. When he testifies to some evidence on a particular subject, then the door is open and all matters related to that can come in."

In his reply brief defendant addresses this rationale only with respect to the testimony concerning the ranger's mention of the outstanding warrant. Defendant does not address his own "spur of the moment" testimony and his attempt to convey the impression that he was under no particular pressure to leave Kentucky. Defendant testified that his plan to go to Florida with Parsons was "no big deal," and that he was not upset by Parsons's withdrawal from that plan, but considered that withdrawal "fine." Evidence that he said he needed to get out of Kentucky because of an outstanding arrest warrant tended to "prov[e] false some portion of his testimony." (*People v. Reyes* (1976) 62 Cal.App.3d 53, 62, citing Evid. Code § 787, subd. (i).) No error has been demonstrated in the admission of this evidence.

As for Ryan's testimony that defendant proposed to rob Ryan's employer, defendant fails both to cite the specific evidence to which he objects and to direct us to

any particular ruling or action by the trial court which he contends was erroneous. Nor does he illuminate the matter, or mention this claim of error, in reply to respondent's argument that the point has not been adequately presented for appellate review. We reject the argument both for these reasons and because defendant appears to have abandoned the point.

V.
POLYGRAPH EVIDENCE

Defendant argues that the trial court erred by striking a testimonial allusion by defendant to Ryan's having taken a polygraph test, and by instructing the jury to disregard that evidence. The matter arose because defendant, in a lengthy response to his own counsel's question as to how he felt about Ryan, volunteered that Ryan "has lied to you and—you know—like yesterday on the polygraph test." Some three weeks later the court took up a request by the prosecution to strike the allusion to a polygraph test and to admonish the jury that "[a]ny reference to a polygraph examination which may have been received in this trial has been stricken and may not be considered by you for any reason." Defense counsel responded only that he had not had "an opportunity to explore any of the polygraph issues." The court stated that it "took Mr. Hall's reference as an intentional violation" in that it was "obviously nonresponsive to the question that was asked." The court said that it would have granted a mistrial had one been requested at the time, and "cautioned" defendant "not to do that or such things again." The court granted the prosecution's request to strike the testimony and admonish the jury.

Evidence Code section 351.1 provides that evidence concerning a polygraph examination "shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results." Defendant acknowledges this statute, but contends that the prosecutor "waived any objection to appellant's testimony and in effect stipulated to its admissibility by failing to object at the time it was given," and by "wait[ing] for two weeks to propose a jury instruction," thereby "put[ting] defense counsel to an obvious disadvantage in responding to the objection." But defendant cites

no authority for the proposition that a delay in objecting to evidence can be interpreted as a stipulation for its admission. The argument is more suggestive of a waiver or estoppel, but we know of no authority that forbids the trial court from sustaining a late objection to inadmissible evidence and admonishing the jury to disregard it. Indeed this would seem a proper situation for resort to Penal Code section 1044, *supra* (see pt. II.B., above). As for estoppel, we see no evidence that the delay caused any "disadvantage" to defendant. Defense counsel stated that he had not "had an opportunity to explore any of the polygraph issues," but even if this inability could somehow be blamed on the prosecution, we fail to see how it could point to prejudice since an "explor[ation]" of the issues could have led only to the conclusion that the evidence was categorically inadmissible in the absence of a stipulation.

Curiously, defendant acknowledges the rule of section 351.1 but goes on to identify certain purposes for which the polygraph evidence was "admissible." The statute, however, flatly mandates the exclusion of any such evidence, for any purpose, in the absence of a stipulation for its admission. (See *People v. Basuta* (2001) 94 Cal.App.4th 370, 390 ["firm and broad exclusion"]; *People v. Price* (1991) 1 Cal.4th 324, 420 [upholding statute over due process objection]; *In re Aontae D.* (1994) 25 Cal.App.4th 167, 173-174 [same]; *People v. Kegler* (1987) 197 Cal.App.3d 72, 89, 90 [statute does not violate right to compulsory process or equal protection, and does not impermissibly usurp judicial power].) Furthermore, defendant made no attempt to lay a foundation for admitting the evidence, by "offer[ing] to prove that the polygraph had been accepted in the scientific community as a reliable technique." (*People v. Price*, *supra*, 1 Cal.4th at pp. 419, 420.)

No error appears.

VI.
ACCESSORY INSTRUCTION

Defendant contends that the trial court erred by refusing to instruct the jury on

what constitutes an accessory to a felony.[10] Defendant did not request, and does not now contend that the jury should have rendered, a verdict on that charge. The proposed instruction told the jury not to speculate on the reasons that it had not been given such a verdict. Counsel contended below that defendant was entitled to this instruction because it embodied his "theory of the case," i.e., "that what appellant did was both a crime in itself, but not a crime that permitted vicarious liability for the preceding homicide." (Underlining in original.) Without such an instruction, he contends, "the jury could have had a reasonable doubt as to who was telling the truth and yet convicted appellant based on his own testimony."

We see no point in the record where this precise rationale was presented to the trial court. Counsel argued below that the instruction "embodies our theory," but did not allude to any need to distinguish between vicarious liability as an aider-abettor and the independent, lesser liability of an accessory after the fact. In refusing the instruction the court said, "You certainly can argue it. You can't argue it as an accessory after the fact, because we don't have that word, or that name, or that definition before us, but you can argue factually that what Mr. Hall did was that after the crime is committed, he assisted someone in avoiding escape and such."

Consistent with this ruling, defense counsel repeatedly argued to the jury that defendant had admitted his involvement in concealing Mr. Schauer's body, and that while

---

[10] The proposed instruction read as follows:

"A person who, after a felony has been committed, harbors, conceals, or aids a principal in that felony, with the specific intent that the principal may avoid or escape from arrest, trial, conviction, or punishment, having knowledge that the principal has committed that felony or has been charged with that felony or convicted thereof, is guilty of the crime of accessory to a felony in violation of Penal Code section 32. However, that person [is] not guilty of murder in any degree, nor is that person guilty of either voluntary or involuntary manslaughter.

"You have not been given a verdict form for Accessory After the Fact and you are not to deliberate about or speculate as to why or why not [*sic*] you have not been given a verdict form on this issue."

this conduct was culpable it did not constitute murder. Thus counsel argued, "Is Richard guilty of helping Ericka after the fact, after she had killed David Schauer? Yes. And he told you that. He told you he followed her back up there, put the limbs on him and walked away." Later, after alluding to instructions on first degree murder and lesser forms of homicide, counsel said, "If after you're through deliberating you decide that the facts as you see them fit into one of the definitions of those offenses, then the corresponding verdict forms have been provided to you . . . . Of course, as you know, Richard has denied being involved in the death of David Schauer in anyway from the beginning. He's told you his involvement began after Mr. Schauer was already dead. [¶] . . . . The simple fact of the matter is that Ericka killed David Schauer. The fact that Richard returns to the scene of the murder, helps her cover up Mr. Schauer, and ends up sharing in the profits of that murder does not make him guilty of murder or robbery, nor does that make him an aider and abettor. As you recall Special Instruction B . . . Richard cannot be an aider or abettor or conspirator if he got involved only after Mr. Schauer was killed. That is Special Instruction B. It will be presented to you."

The cited instruction stated that if the jury found defendant was "not the actual killer," it could "only find him guilty as an aider and abettor or co-conspirator if you find beyond a reasonable doubt that he became an aider and abettor or co-conspirator before the victim was killed." Counsel also emphasized the requirement, as stated in the instructions, that the crime of robbery requires formation of the requisite intent "before or at the time the act of taking the property occurred. It also tells us . . . if this intent was not formed until after the property was taken . . ., the crime of robbery has not been committed. What does that mean? Unless Richard actually killed and murdered David Schauer, and he's told us he didn't do that, you cannot convict him of robbery or murder."

The subject arose again when counsel addressed the evidence offered by the prosecution to support an inference of consciousness of guilt. Counsel argued that assuming the jury drew such an inference, the question remained whether defendant's conduct reflected "consciousness of guilt of murder or consciousness of guilt of what he

did afterwards." On a related point, counsel alluded to an instruction that possession of stolen property is not enough, by itself, to establish guilt of robbery. And counsel returned to the general theme in discussing an instruction on flight as evidence of guilt: "You have to decide which crime Richard was fleeing from. Of course, the prosecution will tell you it's murder. And given that situation, you've got to take a look at what evidence there is to support, which takes us right back to the key question in the case. Richard told you the crimes he committed. The prosecution is telling you he committed murder. You have to decide which of those crimes he was fleeing from. There is no evidence that he was fleeing from murder. His claim is he simply covered up Mr. Schauer with the logs."

The only apparent difference between the defense argument as quoted above and the argument the defense would have liked to give is that in the latter counsel could have used the term "accessory after the fact" to describe the crime he admitted committing. A defendant may be entitled to an instruction, and indeed the trial court may be obliged to instruct sua sponte, on an uncharged offense which is *necessarily included* within the offense charged. (*People v. Birks* (1998) 19 Cal.4th 108, 118-119, and cases cited.) However, a defendant is not entitled to an instruction, over prosecution objection, on an offense which is not necessarily included within the charged offense. (*Id*. at pp. 112-113, 136.) In cases raising such an issue heretofore, however, the instruction does not afford a true "defense," but operates at most as a partial defense. It provides a basis for the jury to reject the greater, charged offense, *but only by convicting the defendant* of the lesser offense. Here, in contrast, defendant asserts the right to establish a complete defense by, in effect, *accusing himself* of a lesser related crime of which the jury cannot actually convict him. In the absence of a more compelling demonstration than defendant has made, we refuse to ratify such a claim.

Defendant cites *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, as support for his position. The Ninth Circuit there granted habeas relief from a conviction for aggravated kidnapping after the trial court had refused to instruct on the lesser included offense of simple kidnapping. (*Id.* at pp. 737-738.) That decision does not stand for the proposition

that a defendant is entitled to formal instructions on an offense which is neither charged nor included in the charges. The lesser offense there (simple kidnapping) was obviously included in the charged offense (kidnapping for robbery); both parties agreed that the lesser instruction should be given; and the trial court not only refused to give the instruction but told defense counsel that it would be " 'wrong to argue' " that " 'there was no robbery since it was not from her person nor under her control.' " (*Id.* at p. 738.) The real error seemed to consist of taking this issue away from the jury. In any event, we read the case as holding only that the trial court violated the defendant's federal constitutional rights by (1) unjustifiably constraining the defense argument to the jury, and (2) erroneously excluding the partial defense that the defendant lacked the intent to rob and thus was not guilty of kidnapping for purposes of robbery, but was at most guilty of simple kidnapping. (*Id.* at pp. 739-740.)

The trial court here did not err by refusing an instruction defining an offense which was neither charged nor necessarily included in the charged offenses.

VII.
"VICTIM IMPACT EVIDENCE"

Defendant moved below to exclude evidence concerning Schauer's residence and the purpose for his presence in California, on grounds that it was irrelevant, should be excluded under Evidence Code section 352, and constituted hearsay. The court denied the motion except that it tentatively excluded references to Schauer's trip as his "dream vacation." During trial counsel made a separate objection, out of the jury's presence, to the anticipated testimony by Kathy Howell, Mr. Schauer's ex-wife and the mother of his children. The prosecutor made an offer of proof accurately describing her anticipated testimony, which concerned her last encounter with Schauer when he brought their children to her home the day before he left for the coast, as well as certain details about his work and interests. The prosecutor also said that he intended to have Ms. Howell identify Schauer from a photograph already marked in evidence. Defense counsel objected that nearly all of the proposed testimony was hearsay, all of it was irrelevant,

and particularly that Schauer had already been "accurately identified" by the coroner and witnesses. After considerable colloquy the court ruled that defense counsel could "make objections as we go," but that much of the proposed testimony "would seem to be admissible." The court identified certain matters which seemed plainly irrelevant, but concluded that it had no "other comment other than handling objections as they come in to specific questions."

Ms. Howell was thereafter called and testified as follows: She was married to Mr. Schauer for nine years. He was the father of her two children. He and she were friends for 20 years. He was depicted in a photograph, subsequently admitted in evidence, taken the year before the trial when he was dropping off the children. At that time he told her that he was planning to fly to Seattle the following week, get a drive-away car, go down the coast, and return to Ohio from the Los Angeles airport. She was not sure whether he took camping equipment with him, but he took a musical keyboard. He had made his living for 13 years working as a clerk at the Cleveland Post Office, and he was also a part-time wedding musician. He had a collapsed vertebra in his back, for which he was being treated by an Ohio physician.

Despite the court's earlier reservation of a ruling on most of the defense objections, no contemporaneous objections were made to any part of Ms. Howell's testimony. This was a clear waiver of any evidentiary objection. (Evid. Code, § 353.) Defendant may be understood to suggest that the prosecutor converted this testimony into "victim impact evidence" by alluding to it in jury argument in a manner calculated to elicit sympathy.[11] Again, however, no objection was made below.

In any event we believe the admission of this evidence was harmless by any

---

11 "The defendant entered a plea of not guilty . . . . And legally that put at issue everything . . . . [H]is testimony in this case makes superfluous the testimony of many of the witnesses who were called during the People's case in chief. He does not now dispute that David Schauer was a human being. So Kathy Howell's identification . . . of David as her friend and the father of her two children, is no longer at issue, not being contested . . . ."

standard. The primary vice in victim impact evidence is that by engendering sympathy for the victim, it elicits a correlative desire for vengeance which may influence it to find the defendant guilty lest the crime go unpunished. Where the jury must choose among charges with varying degrees of culpability, victim impact evidence creates a risk of inflaming the jury to find a higher degree of culpability than it would otherwise have found. But in this case the defense theory left the jury only to decide which of two people had murdered Mr. Schauer—defendant or Ericka Ryan. Ryan already stood to be punished, having pleaded guilty. The verdict turned largely on the credibility of these two eyewitnesses and the degree of consistency between their accounts with the other evidence, including forensic evidence. While the jury had the option of finding defendant guilty of the lesser offenses of second degree murder or manslaughter, we see no realistic possibility that it would do so on this state of the case. Rather, under the defense theory, defendant was either guilty of first degree murder as the active killer of David Schauer for purposes of robbery, or he was not guilty of any charged offense, because Ryan alone killed Schauer, without any advance assistance from, or involvement by, defendant. Given this framing of the issues we find it all but inconceivable that the jury's verdict was affected by the testimony of Howell. We thus find the admission of that testimony to be, at worst, harmless error.

The judgment is affirmed.

_____
Sepulveda, J.

We concur:

_____
Kay, P.J.

_____
Reardon, J.